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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/663,493	09/16/2003	Joseph P. Errico	F-289	2440
51640	7590	11/16/2007	EXAMINER	
SPINE MP			PELLEGRINO, BRIAN E	
LERNER, DAVID, et al.			ART UNIT	PAPER NUMBER
600 SOUTH AVENUE WEST			3738	
WESTFIELD, NJ 07090				
MAIL DATE		DELIVERY MODE		
11/16/2007		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/663,493	ERRICO ET AL.
	Examiner	Art Unit
	Brian E. Pellegrino	3738

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 13 August 2007.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-20 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 1-20 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on 12 April 2004 is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_

5) Notice of Informal Patent Application (PTO-152)  
 6) Other: \_\_\_\_\_

## DETAILED ACTION

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 8/13/07 has been entered.

### ***Drawings***

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the flat perimeter surface of one of the baseplates being longer than the flat surface of the angled distal end (of the tool) must be shown or the feature(s) canceled from the claim(s). According to the specification (paragraph 142) , this arrangement appears to be the opposite of what is claimed. No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure

is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 9 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 9 recites the limitation "the angled distal end" in line 4 of the claim. There is insufficient antecedent basis for this limitation in the claim.

#### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fraser et al. (6478800) in view of Buttner-Janz et al. (5401269) and McGahan et al. (WO 01/62191). Fraser et al. disclose (Fig. 1) a spinal implant **24** and tool set **10** for implantation. Fraser shows (Fig. 4) an implant with upper and lower baseplates having perimeters. Fraser also shows (Fig. 12) the tool with corresponding distal surface **106** and a plurality of spacers or projections protruding outwardly from the distal surface to thus form a recessed engaging surface. However, Fraser et al. fail to disclose the implant's baseplates being articulatable relative to one another and that the corresponding surfaces of the baseplate and tool are angled. It is noted that Fraser discloses other spinal implants are capable of use with the tool, col. 3, lines 54-56. Buttner-Janz et al. teach (Figs. 3,4) a spinal implant with first and second plates that are articulatable and have slot on the outer surface capable of receiving a tool. McGahan et al. illustrates (Fig. 15b) a spinal orthopedic set with a spinal implant **10** with angled perimeter surfaces having a central flat surface **22** flanked by two flat corner perimeter surfaces **18, 26** that correspond to the angled distal end of the tool having central surface **128** and two flanked flat surfaces **126, 130** to engage the implant. McGahan teaches that angled perimeter flat surfaces are provided to prevent rotation of the implant when inserting with the tool, page 12, lines 21-24. McGahan also shows (Fig. 22B) a difference in dimension of the implant surface and the tool engaging surface. McGahan show (Figs. 29A,B) another insertion tool and implant where the corresponding angled surfaces comprise a central flat surface flanked by two adjacent flat surfaces and thus form corners. Regarding claims 13-15, since the tool is capable of

being positioned about the implant in several locations, respective desired surgical approaches are capable of being used. It would have been obvious to one of ordinary skill in the art to modify the set and use an articulating implant as taught by Buttner-Janz et al. with the tool of Fraser et al. since this would provide a patient with the ability to permit motion between the vertebrae and it further would have been obvious to one of ordinary skill in the art to also utilize angled flat perimeter surfaces on the plates and tool as taught by McGahan and modify the spinal implant and tool set of Fraser et al. as modified by Buttner-Janz such that it provides the surgeon with more precise control of the spinal implant or a more "locked" fit between the tool and implant. A modification of the engaging surfaces between the tool and that of the spinal implant would be within the skill of one of ordinary skill in the art since it would not change the ability of the device's baseplates from articulating with respect to one another. Thus the modification of Fraser's tool in view of McGahan's teaching would result in having at least three flat surfaces and form at least two recessed corners.

#### ***Response to Arguments***

Applicant's arguments with respect to claims 1-20 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on Monday-Friday from 8:30am to 6pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott, can be reached at 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

TC 3700, AU 3738

BRIAN E. PELLEGRINO  
PRIMARY EXAMINER

*Brian Pellegrino*